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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/765,423
Filing Date: January 27, 2004
Appellant(s): HOFRICHTER ET AL.

Idris N. McKelvey
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed August 1, 2007 appealing from the Office action mailed August 18, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is incorrect.

The amendment after final rejection filed on October 3, 2006 has not been entered.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1, 3-16 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fowler et al. (US Patent No. 5,534,265), hereinafter "Fowler".

Fowler teaches a non-abrasive personal cleansing aqueous gel composition comprising (a) from about 0.1% to about 20% of insoluble particles having a mean particle size diameter from about 1 micron to about 75 microns, with greater than about 95% of said particles in said composition having a diameter less than about 75 microns, (b) from about 0.05% to about 10% of a water soluble or dispersible gelling agent, and (c) from about 20% to about 99.85% water, all percentages are by weight of the total composition (see col. 2, lines 27-38). Particles having a wide range of shape, surface characteristics, and hardness characteristics can be utilized herein provided the particle size requirements are met (see col. 4, lines 15-17). The composition also comprises from about 0.05% to about 40% of a surfactant, from about 0.1% to about 50% of an emollient (see claim 1), and from about 0.1% to about 10% of a skin conditioner (see claim 3). The gelling agent also include cationic polymers (see col. 8, line 8 to col. 9, line 11). Other gelling agents include polysaccharides such as hydroxypropylcellulose (see col. 9, lines 40-67). Fowler also teaches a method of cleansing skin which comprises applying to the skin from about 0.5 mg/cm² to about 25 mg/cm² of the above composition (see claim 4). Suitable insoluble particles include aluminum oxide, iron oxide, polyethylene, nylon, silica, etc. and mixtures thereof (see col. 4, lines 18-41). Fowler, however, fails to specifically disclose (1) a composition comprising irregularly

shaped and spherical particles having median particle sizes as those recited, and (2) the charge density and molecular weight of the cationic polymer.

With respect to difference (1), it would have been obvious to one of ordinary skill in the art at the time the invention was made to have prepared a personal cleansing composition comprising a mixture of irregularly shaped particles and spherical particles as suggested in col. 4, lines 15-41 and to have optimized the median particle sizes of the spherical particles and the irregularly shaped particles because Fowler teaches in col. 4, lines 15-17 that particles having a wide range of shapes can be utilized, and that the particles have a mean particle size diameter from about 1 micron to about 75 microns as disclosed in col. 2, lines 29-33. Hence, optimization through routine experimentation for best results is within the level of ordinary skill in the art., see *In re Boesch*, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980).

With respect to difference (2), it would have been obvious to one of ordinary skill in the art at the time the invention was made to reasonably expect the charge density and molecular weight of the cationic polymer to be within those recited because similar cationic polymers have been utilized.

(10) Response to Argument

The Appellant Argues

A. With respect to the rejection based upon Fowler, Appellants argue that a *prima facie* obviousness has not been established because Fowler fails to address the problem which is remedied by Appellants' claimed invention. Appellants then argue

"The Office Action asserts that because col. 1, lines 7-9 of Fowler teaches that a personal care composition comprising micronized cleansing particles is useful for cleansing the skin and hair, that routine experimentation would have led one of ordinary skill in the art to Appellants' claimed invention. However, the particles in Fowler are specifically directed to a cleansing benefit. In fact, at col. 3, line 34, Fowler calls the particles, "cleansing particles." Therefore, Fowler does not address the problem of improving volume, body and fullness as taught by Appellants. See the written description at page 2, lines 23-26."

B. Appellants also argue that a *prima facie* obviousness has not been established because Fowler fails to provide any motivation to modify the cited reference to produce Appellants' claimed invention. Appellants then argue *"Fowler only teaches that particles having a size greater than about 75 microns are tactilely perceivable and that particles of less than about 1 to about 5 microns are generally less effective for providing a cleansing benefit. See Fowler at col. 3, lines 26-33. Therefore, Fowler only provides a motivation to modify particle size, through routine experimentation, in order to optimize cleansing performance. In contrast, Fowler does not teach or suggest that any benefit is achieved by formulating specific shapes or sizes, or combinations of shapes and sizes of particles in its compositions. Therefore, Fowler provides no motivation to one of ordinary skill in the art to optimize particle proportions, because Fowler fails to teach or suggest any correlation between particle proportion optimization and any benefit whatsoever."*

The Examiner's Response

A. The Examiner respectfully disagrees with argument A above because in col. 1, lines 7-9, Fowler teaches that the personal care composition which comprises the micronized cleansing particles is useful for cleansing the skin and hair. In response to Appellants' argument regarding Fowler's particles as being specifically directed to a cleansing benefit and Fowler not addressing the problem of improving volume, body and fullness as taught by Appellants, even though Fowler does not explicitly disclose the composition as to its usefulness in improving hair volume, body, and fullness while simultaneously delivering improved wet conditioning and combing performance, it would have been obvious to one of ordinary skill in the art at the time the invention was made to reasonably expect the composition of Fowler to exhibit similar properties because similar ingredients have been utilized. The present claims are drawn to a personal cleansing composition and Fowler teaches the same analogous art of personal cleansing composition as evidenced throughout the specification, see in particular the title, abstract, col. 1, lines 7-9, col. 2, lines 27-28 and 48.

B. The Examiner respectfully disagrees with argument B above because in col. 4, lines 15-57, Fowler teaches particles having a wide range of shapes, surface characteristics, and hardness characteristics, provided the particle size requirements are met, i.e., from about 1 micron to about 75 microns (see col. 2, lines 29-33), and examples include alumina, aluminum oxide, iron oxide, polyethylene, nylon, silica, tin oxide, etc. and mixtures thereof (underlinings supplied). The polyethylene and nylon

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correspond to the spherical particles and the alumina, aluminum oxide, iron oxide, silica, tin oxide correspond to the irregularly shaped particles. The particle sizes of the above particles overlap Appellants' particle size of at least 0.01 micron. With respect to the median particle sizes of the spherical particles being greater than the median particle sizes of the irregularly shaped particles, it would have been obvious to one of ordinary skill in the art at the time the invention was made to optimize the median particles sizes of said particles through routine experimentation for best results. As to optimization results, a patent will not be granted based upon the optimization of result effective variables when the optimization is obtained through routine experimentation unless there is a showing of unexpected results which properly rebuts the *prima facie* case of obviousness. See *In re Boesch*, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). See also *In re Woodruff*, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936-37 (Fed. Cir. 1990), and *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). In Example 4, Fowler teaches a cleanser comprising two kinds of polyethylene particles, one having a mean particle size diameter of 25 microns, and the other having a mean particle size diameter of 45 microns, and that, in the alternative, the polyethylene particles are replaced with particles of equivalent mean particle size or with particles of other mean particle sizes in the range from about 1 micron to about 75 microns, for example, nylon (see col. 21, line 34 to col. 22, line 7). This teaching suggests the mixture of particles where one particle has a median particle size greater than the median particle size of the other particle, and also suggests the mixture of different particles. In addition, in col. 4, lines 15-41, Fowler teaches the different particles having

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a wide range of shapes, and , in col. 1, line 53 to col. 2, line 10, Fowler also teaches a non-abrasive, non-irritating cleansing product, without the disadvantage of overly abrasive particles. This teaching suggests the advantage of utilizing spherical particles having a median particle size greater than the median particle size of the irregular particles. Further, Appellants did not dispute that the personal cleansing composition of Fowler uses both irregularly shaped particles and spherical particles. Finally, Appellants have not provided any showing of criticality of their composition as to improved volume, body and fullness when utilizing spherical particles having a median particle size greater than the median particle size of the irregularly shaped particles, when compared to a prior art having a wide range of shapes as in Fowler.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.


Respectfully submitted,

/Lorna M. Douyon/
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